

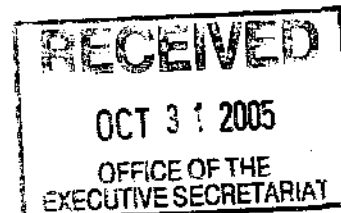
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**PACIFIC ENVIRONMENTAL ADVOCACY CENTER**  
10015 S.W. Terwilliger Boulevard  
Portland, Oregon 97229  
phone: 503-768-6727 fax: 503-768-6642

October 21, 2005

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Stephen L. Johnson  
Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Ave., NW  
Washington, DC 20460



Mr. L. Michael Bogert  
Regional Administrator  
United States Environmental Protection Agency, Region 10  
1200 6th Avenue (RA-140)  
Seattle, WA 98101

**Re: Supplemental Sixty-Day Notice of Intent to Sue for Failure to Perform  
Mandatory Duties Pursuant to the Clean Water Act and Endangered Species  
Act Regarding Oregon's Water Quality Standards for Toxic Pollutants**

Dear Mr. Johnson and Mr. Bogert:

Pursuant to section 505(a)(2) of the Clean Water Act (CWA), 33 U.S.C. § 1365, and section 11(g)(1)(A) of the Endangered Species Act (ESA), 16 U.S.C. § 1540, this letter provides notice that Northwest Environmental Advocates (NWEA) intends to file suit against the United States Environmental Protection Agency (EPA) for violating the CWA and the ESA by failing to act upon, and specifically, failing to disapprove the water quality standards submitted by the State of Oregon for toxic pollutants, by failing to promulgate protective water quality criteria for toxic pollutants and an implementation plan for related narrative criteria, and by failing to consult with the U.S. Fish and Wildlife Service and NOAA Fisheries and prevent jeopardy to endangered and threatened species.

By letters dated February 11, 2002, May 28, 2004, and June 18, 2004, NWEA notified EPA of its intent to sue for CWA and ESA violations related to Oregon's water quality standards

05-001- 6247

for toxic pollutants.<sup>1</sup> On July 8, 2004, after more than fifteen years of inaction on water quality standards for toxic pollutants, the Oregon Department of Environmental Quality (DEQ) reviewed its criteria for toxic pollutants and submitted revised criteria to EPA. The proposed Oregon water quality criteria do not, however, protect designated beneficial uses and existing uses, in violation of the CWA and EPA regulations. Oregon's July 8, 2004 submission, therefore, does not remedy EPA's failures identified in NWEA's previous notice letters, and EPA remains in violation of the CWA and the ESA.

## **I. EPA HAS FAILED TO FULFILL ITS OBLIGATIONS UNDER THE CLEAN WATER ACT**

The CWA requires states to promulgate water quality standards consisting of: 1) one or more designated "uses" for each waterway; 2) water quality "criteria" specifying the concentrations of pollutants that may be present in those waters and still protect the designated uses; and 3) an antidegradation policy. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.11; 40 C.F.R. § 131.12. The criteria established typically consist of specific numeric criteria along with narrative criteria which serve to fill the gaps left by numeric criteria that have not been updated, do not exist, or were not developed to protect the most sensitive uses of a water body.

A state is required to review its water quality standards at least every three years, and make the result of these triennial reviews available to EPA. 33 U.S.C. § 1313(c)(1); 40 C.F.R. § 131.20(c). The statute specifically requires that as part of each triennial review the state "shall adopt criteria for all toxic pollutants" identified as such by the EPA, the "discharge or presence of which in the affected waters could reasonably be expected to interfere with [the] designated uses[.]" 33 U.S.C. § 1313(c)(2)(B); *see also* 40 C.F.R. § 131.11(a)(2).<sup>2</sup> The criteria are to be specific numeric criteria or, where EPA has not issued recommended values, they must be "based on biological monitoring or assessment methods." *Id.*; 40 C.F.R. § 131.11(b)(2).

Revised or newly adopted water quality standards are submitted to EPA for review and approval or disapproval. 33 U.S.C. § 1313(c)(2)(A). EPA must notify the state within sixty days

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<sup>1</sup> NWEA's February 11, 2002 Sixty-Day Notice of Intent to Sue, May 28, 2004 Sixty-Day Notice of Intent to Sue, and June 18, 2004 Supplemental Sixty-Day Notice of Intent to Sue are attached hereto as Exhibits 1, 2, and 3, respectively, and are hereby incorporated by reference.

<sup>2</sup> The state numeric water quality standards are heavily influenced by suggested national recommended criteria that EPA is required to develop, publish, and revise to "accurately reflect[] the latest scientific knowledge." 33 U.S.C. § 1314(a)(1). As part of the 1987 amendments to the CWA, EPA is also required to prepare and periodically revise a list of toxic priority pollutants. 33 U.S.C. § 1317(a)(1); *See* EPA, National Recommended Water Quality Criteria: 2002 (November 2002).

if it approves the new or revised standard as complying with the CWA. 33 U.S.C. § 1313(c)(3). If EPA disapproves the standard, it must notify the state of required changes within ninety days of the state's submission. *Id.* EPA must therefore take action on a state's submission of each water quality standard within ninety days of the state's submission of such standard or standards. EPA also must create standards for a state if such federal action is necessary to bring a state into compliance with the CWA. 33 U.S.C. §1313(c)(4)(A) and (B).

**A. EPA Has Violated its Mandatory Duty Under CWA Section 303(c)(3) by Failing to Act on Oregon's Water Quality Standards for Toxic Pollutants Within the Required 90-Day Time Period**

DEQ submitted its revised water quality standards for toxic pollutants to EPA on July 8, 2004. EPA was required to approve or disapprove the water quality standards within the timelines set forth in CWA section 303(c)(3), 33 U.S.C. §1313(c)(3). EPA missed both the 60-day deadline for approving the submitted water quality standards, and the 90-day deadline for disapproving the standards. EPA's failure to make a determination on the adequacy of Oregon's water quality standards for toxic pollutants within the statutory time frame is a direct violation of CWA section 303(c)(3), 33 U.S.C. §1313(c)(3). EPA must act upon, and specifically disapprove, Oregon's water quality standards for toxic pollutants.

**B. EPA Has Violated its Mandatory Duties Under CWA Section 303(c)(4)(A) and (B) to Promulgate Adequate Water Quality Standards for Toxic Pollutants in Oregon**

EPA must create water quality standards for a state if necessary to bring a state into compliance with the CWA. 33 U.S.C. §1313(c)(4)(A) and (B). Oregon has failed to promulgate: 1) criteria to protect wildlife; 2) criteria based on biological monitoring or assessment methodology; and 3) an implementation methodology for narrative criteria. These failures trigger EPA's mandatory duty to promulgate water quality standards for Oregon.

**1. EPA has Violated Its Mandatory Duty to Promulgate Wildlife Criteria**

Section 303(c)(2)(A) requires that new or revised water quality standards "consist of designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). The water quality criteria must be based on "sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1). For waters with more than one use designation, "the criteria shall support the most sensitive use." *Id.*

When classifying designated uses, a state must consider “protection and propagation of fish, shellfish and *wildlife*.” 40 CFR § 131.10(a) (emphasis added). EPA’s Water Quality Standards Handbook provides, “[s]tates must provide water quality for the *protection and propagation of fish, shellfish, and wildlife, and provide for recreation in and on the water* where attainable.” Environmental Protection Agency, Water Quality Standards Handbook (2d ed.) at 2-1, (1994) (emphasis in original). The Handbook further provides, “[w]ildlife protection should include waterfowl, shore birds, and other water oriented wildlife.” *Id.* As required by federal rule, wildlife is a designated use in Oregon. See e.g., OAR 340-41-0101, Table 101(A) (showing wildlife as a designated beneficial use of the mainstem Columbia River). Oregon’s proposed water quality criteria, therefore, must protect the designated use of wildlife. 40 CFR § 131.11(a)(1).

Oregon’s proposed water quality standards do not include wildlife criteria for toxic pollutants. This is a violation of CWA section 303(c)(2)(A), 40 C.F.R. § 131, and EPA guidance. Pursuant to CWA section 303(c)(4)(A) and (B), 33 U.S.C. §1313(c)(4)(A) and (B), EPA has a mandatory duty to promulgate criteria consistent with the applicable requirements. By failing to promulgate wildlife criteria for toxic pollutants in Oregon, EPA has violated its mandatory duty under CWA § 303(c)(4)(A) and (B), 33 U.S.C. §1313(c)(4)(A) and (B).

## **2. EPA Has Violated Its Mandatory Duty to Promulgate An Implementation Methodology for Narrative Criteria**

The CWA requires that states adopt water quality criteria to protect the designated uses of the waterbody. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.11(a)(1). If a state adopts narrative criteria for toxic pollutants, it “must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria.” 40 CFR § 131.11(a)(2). DEQ has proposed narrative criteria for toxic pollutants. DEQ has not, however, created a methodology for the interpretation of its narrative toxic criteria. Therefore, pursuant to CWA section 303(c)(4)(A) and (B), 33 U.S.C. §1313(c)(4)(A) and (B), EPA is required to promulgate an adequate methodology for the interpretation of Oregon’s narrative toxic criteria. By failing to promulgate an implementation methodology for Oregon’s narrative criteria for toxic pollutants, EPA has violated its mandatory duty under CWA § 303(c)(4)(A) and (B), 33 U.S.C. §1313(c)(4)(A) and (B).

## **3. EPA Has Violated its Mandatory Duty to Promulgate Criteria Based on Biological Monitoring or Assessment Methods**

The CWA requires that states “shall adopt criteria for all toxic pollutants” identified as such by the EPA, the “discharge or presence of which in the affected waters could reasonably be expected to interfere with [the] designated uses[.]” 33 U.S.C. § 1313(c)(2)(B); see also 40

C.F.R. § 131.11(a)(2). The criteria are to be specific numeric criteria or, where EPA has not issued recommended values, they must be “based on biological monitoring or assessment methods.” *Id.*; 40 C.F.R. § 131.11(b)(2). Oregon has failed to adopt criteria based on biological monitoring or assessment methods for several toxic pollutants which currently do not have numeric criteria. Consequently, EPA is under a mandatory duty pursuant to CWA section 303(c)(4)(A) and (B), 33 U.S.C. § 1313(c)(4)(A) and (B), to promulgate the criteria based on biological monitoring or assessment methods for Oregon.

## **II. EPA HAS FAILED TO FULFILL ITS OBLIGATIONS UNDER THE ENDANGERED SPECIES ACT**

The purpose of the ESA is to “provide a program for the conservation of . . . endangered species and threatened species” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). The overarching policy of the ESA is that all federal departments and agencies must use their authorities to conserve species listed as threatened or endangered. 16 U.S.C. § 1531(c)(1).

Section 7 of the ESA places on federal agencies both substantive and procedural obligations with respect to listed species. 16 U.S.C. § 1536. All federal agencies are under an affirmative duty, in consultation with the U.S. Fish and Wildlife Service and NOAA Fisheries, to ensure that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species[.]” 16 U.S.C. § 1536(a)(2).

EPA has failed to fulfill its obligations under ESA section 7(a)(2). Neither the existing water quality standards for toxics, nor the standards that Oregon submitted on July 8, 2004, protect threatened or endangered species in Oregon, including bald eagle, brown pelican, marbled murrelet, and salmonid species. EPA has not consulted on Oregon’s toxic criteria, and has not ensured that Oregon’s toxics criteria will not jeopardize the continued existence of listed species, in violation of both the procedural and substantive elements of section 7(a)(2), 16 U.S.C. § 1536(a)(2).

## **III. PERSONS GIVING NOTICE**

The name, address, and telephone number of the party providing this notice is:

Northwest Environmental Advocates  
P.O. Box 12187  
Portland, OR 97212-0187  
(503) 295-0490

Mr. Stephen Johnson, Administrator  
October 21, 2005  
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The attorneys representing the party in this notice are:

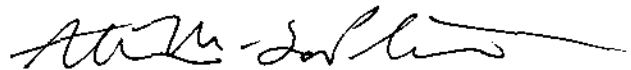
Melissa Powers (OSB No. 02118)  
Allison LaPlante (OSB No. 02361)  
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#### IV. CONCLUSION

EPA has failed to satisfy the requirements of the CWA and the ESA. NWEA requests that the EPA Administrator take immediate action to address the violations related to Oregon's toxics criteria. To this end, EPA should make a determination, and specifically disapprove, the criteria Oregon submitted to EPA for review on July 8, 2004. EPA should promulgate criteria for toxic pollutants at levels that are protective of all of Oregon's designated uses and establish methodology for the implementation of Oregon's narrative criteria. Furthermore, EPA should consult with the U.S. Fish and Wildlife Service and NOAA Fisheries and ensure that threatened and endangered species are adequately protected.

As always, it is our hope that this notice will make it unnecessary to pursue litigation concerning this issue, but we are prepared to seek judicial intervention to address the Agency's failure to properly carry out its mandatory duties under the CWA and the ESA. In addition to the bringing claims for the violations set forth above, NWEA will seek judicial review of EPA's actions and inactions pursuant to the Administrative Procedure Act, 5 U.S.C. § 706.

Sincerely,



Allison LaPlante

Melissa Powers

Pacific Environmental Advocacy Center

cc:

Stephanie Hallock, Director  
Oregon Department of Environmental Quality  
811 SW 6<sup>th</sup> Ave.  
Portland, OR 97204

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October 21, 2005  
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Alberto Gonzales, Attorney General  
United States Department of Justice  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530-0001